

Washoe Tribe of Nevada and California



March 17, 2011

Ken Salazar
Secretary of the Interior

Larry Echo Hawk
Assistant Secretary - Indian Affairs

Office of the Assistant Secretary - Indian Affairs
U.S. Department of the Interior
1849 C St., N.W.
MS-4141-MIB
Washington, D.C. 20240
consultation@doi.gov

VIA ELECTRONIC MAIL

Re: *Department of Interior's Draft Tribal Consultation Plan*

Dear Secretary Salazar & Assistant Secretary Echo Hawk:

The Washoe Tribe of Nevada and California offers its comments regarding the Department of the Interior's (DOI) Draft Policy regarding tribal consultation and coordination issued on January 14, 2011. The Tribe submits these comments after the official close of the comment period, which was March 14, 2011. The Tribe appreciates your willingness to consider these late comments. The Tribe previously submitted written comments to the DOI's plan for development of the Draft Policy and participated in the January 12, 2010, in-person discussion of the matter held in Phoenix, Arizona.

President Obama's Memorandum of November 5, 2009, states that pursuant to Executive Order 13175, executive departments and agencies, "... are charged with engaging in regular and meaningful consultation and collaboration with tribal officials ..." Towards the DOI's Draft Policy on consultation and collaboration, the Washoe Tribe's written comments are as follows:

In order to be regular and meaningful, Tribal consultation must occur whenever actions by any of the Departments within the DOI will impact Tribal interests; and such consultation must occur long before any decisions are made.

The Washoe Tribe believes firmly that effective consultation is an ongoing, interactive

process. Regular and meaningful consultation is an ongoing dialogue. Consultation is not a task that is simply initiated, implemented and completed in order to further any one particular undertaking or goal. The Tribe appreciates the DOI including within the Draft Policy a broad definition of those actions by the DOI that may impact tribal interests. As previously noted by the Tribe, the Bureau of Indian Affairs (BIA) has refused the consult with the Tribe in the past by stating that BIA's action was "pre-decisional" and therefore not subject to the BIA's own consultation policy. The BIA was not claiming there was no impact to the Washoe Tribe in the actions being taken, but that the type of action being taken was outside the scope of the BIA's consultation policy. This is unacceptable and the Draft Policy would make such stance more difficult for the BIA to support. By contrast, any consultation policy must ensure Tribal engagement and involvement in the determination of whether a particular policy or action will affect Tribal interests. Consultation cannot be limited to those circumstances where an agency makes an independent determination that the effect on a Tribe's interests warrants consultation or that consultation is required. Meaningful consultation includes Tribal involvement in the most fundamental questions regarding the need for action, the strength of the impact on the Tribe's interests, and the scope of issues to be considered. Early, pre-draft consultation helps insure that complex matters are thoroughly vetted, analyzed and understood before positions are taken. Any consultation policy that allows the Departments of the DOI to unilaterally determine if consultation is not necessary would be contrary to the spirit and intent of both Executive Order 13175 and the President's November 5, 2009, directive. In numerous places in the Draft Policy, the Departments are left with significant discretion in determining the application of the Policy to particular actions.

In order to be regular and meaningful, Tribes must have ample notice of upcoming Tribal consultations and sufficient response time.

Though the Tribe welcomes the Draft Policy setting a minimum notice requirement for consultation opportunities at least 30 days, the Tribe suggests a minimum notice of no less than 45 days and preferably 60 days. Most tribes operate with few resources. The Washoe Tribe is no different. When DOI gives short notice of consultations, travel expenses are more costly. Resources that should rightfully be spent ensuring the safety and security of those living on Washoe lands have to be diverted to costly travel expenses. The Tribe is forced to choose between attending face-to-face consultations to address important nation-wide issues and to call attention to issues they face or staying home to attend to those issues. In addition, when short notice is given, the Tribe does not have enough time to properly prepare. Regular and meaningful consultation requires ample notice so that the tribes have an opportunity to gather tribal leaders, develop positions on discrete issues, decide who should attend the consultation and make the necessary travel arrangements. Similarly, when calling for comments or input from Tribes, rather than an open "reasonable" time as stated in the Draft Policy, a sufficient response time would be 45 to 60 days. This would provide the Tribes with ample opportunity to respond and reduce the discretion of the Departments to unilaterally determine a shorter time period is "reasonable" under the circumstances.

In order to be meaningful, any consultation policy must include follow-up provisions.

When Tribes consult with federal officials, work hard to identify mutually agreeable solutions to problems, and then are never informed whether or not those solutions were implemented, it is demoralizing and disconcerting. It leads Tribal leaders to question whether or not expending the resources to attend consultations is in the best interests of those living on Tribal lands. Additionally, Tribal leaders do not know what works if they are not informed when effective solutions are found. As such, follow-up processes and notification requirements should

be included in the Draft Policy.

In order to be meaningful, any consultation policy must provide for accountability.

A consultation policy without accountability cannot provide for meaningful Tribal consultation. In the example used above, where the BIA determined it was not required to consult with the Washoe Tribe, the same BIA official who declined the Tribe's request for consultation also determined (in response to the Tribe's request for information on who the appeal should be addressed to) that such decision was not appealable. So, not only did the BIA determine it did not need to consult with the Tribe, the BIA decided there was no method available for the Tribe to hold them accountable for that decision through an administrative process. This renders any consultation policy null. Though the DOI's Draft Policy does make reference to "Accountability and Reporting" there are no concrete standards and/or processes provided for such accountability for the Tribes. The Draft Policy should provide Tribes with a remedy when there is a failure to consult in accordance with the Policy. This remedy should, at the very least, stay any proposed action until that consultation process has been completed in compliance with the Policy. The Draft Policy should require that the DOI provide a response to requests for consultation within a certain period of time. It should also provide for a clear chain of appeal for any decision not to consult so that there is accountability within the DOI. As an example, the Department of Health and Human Services, Administration for Children and Families, published a draft consultation policy that provided provisions for accountability that could allow Tribes to ensure its rights to consult with the Department are protected. Unfortunately, the Tribe has had too many experiences with what happens when such concrete protections are not provided. Tribes deal daily with significant and ongoing threats to their members' health, safety, and welfare. Too often the federal agencies within the DOI with trust responsibility to act in the best interests of Tribes place themselves in opposition to those Tribes. This requires expending precious Tribal resources to fight to protect Tribal interests from the Tribe's trustee rather than focusing resources on the original threats. For instance, in the Pine Nut Allotments south of the Washoe Dresslerville Community there exist real and recurring issues regarding cultural resources, development, law enforcement, public safety, trespass, property boundaries, water resources, water rights, environmental degradation, and jurisdiction. Rather than working with the Washoe Tribe collaboratively to attempt to come to some type of mutual resolution to these many issues, the BIA has repeatedly taken positions against the Tribe's interests, continues to provide blanket statements that the Tribe has absolutely no authority within the Pine Nuts, and/or refuses to engage in consultation on particular actions taken by the BIA within the area. The result is that the issues in the Pine Nuts remain unresolved.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read 'Wanda Batchelor', written in a cursive style.

Wanda Batchelor, Chairwoman